

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition for Waiver of Embargo	)	
Local Operating Companies of	)	
Sections 61.3 and 61.44-61.48 of the	)	
Commission's Rules, and any Associated	)	WC Docket No. 08-160
Rules Necessary to Permit it to Unify	)	
Switched Access Charges Between	)	
Interstate and Intrastate Jurisdictions	)	

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**COMMENTS OF THE  
NEW JERSEY DIVISION OF RATE COUNSEL**

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August 26, 2008

**Before the  
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**I. INTRODUCTION**

Pursuant to the Public Notice issued by the Federal Communications Commission ("FCC" or "Commission"),<sup>1</sup> the New Jersey Division of Rate Counsel ("Rate Counsel")<sup>2</sup> submits these preliminary comments in the above-captioned proceeding. On August 1, 2008, Embarq submitted a petition for waiver to allow it to unify interstate and intrastate switched access rates.<sup>3</sup>

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<sup>1</sup> / "Petition for Waiver of Embarq, Pleading Cycle Established," FCC Public Notice, DA 08-1846, August 5, 2008.

<sup>2</sup> / Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. Rate Counsel participates actively in relevant Federal and state administrative and judicial proceedings. The above-captioned proceeding is germane to Rate Counsel's continued participation and interest in implementation of the Telecommunications Act of 1996 ("Act" or "1996 Act"). Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as "the 1996 Act," or "the Act," and all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code. One of Embarq's study areas is the portion of New Jersey that United Telephone Company of New Jersey, Inc., d/b/a Embarq serves.

<sup>3</sup> / In the Matter of Petition for Waiver of Embarq Local Operating Companies of Sections 61.3 and 61.44-61.48 of the Commission's Rules, and any Associated Rules Necessary to Permit it to Unify Switched Access Charges Between Interstate and Intrastate Jurisdictions, WC Docket No. 08-160, August 1, 2008 ("Petition").

Embarq's Petition followed closely after the petition that AT&T Inc. ("AT&T") submitted on July 24, 2008, in which AT&T seeks a declaratory ruling, pending comprehensive reform.<sup>4</sup>

These two back-to-back petitions underscore the importance of the Commission addressing intercarrier compensation reform in a single comprehensive proceeding, rather than through piecemeal review of disparate petitions.<sup>5</sup> The Embarq Petition shares some of the flaws that characterize the AT&T Petition: both petitions lack supporting documentation. Therefore, as with the AT&T Petition, the Commission should dismiss the Embarq Petition and require Embarq to include comprehensive supporting work papers and data in any future petition. In the alternative, the FCC should require Embarq to supplement the Petition, proceed by issuance of a notice of proposed rulemaking, making Embarq's Petition part of such rulemaking, and republish notice in the Federal Register with revised dates for comments and reply comments.

## II. DISCUSSION

Embarq seeks conditional waivers of the Commission's rules to allow Embarq to unify its intrastate and interstate rates. The waiver would enable Embarq to reduce its intrastate switched access rates, and to offset these rate reductions with "relatively modest increases in interstate

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<sup>4</sup> / AT&T seeks immediate clarification regarding the proper terminating charges for Internet protocol to public switched telephone network ("IP-to-PSTN") traffic and PSTN-to-IP traffic, and also seeks to eliminate the disparity between its interstate and intrastate terminating switched access rates. Petition of AT&T Inc. for Interim Declaratory Ruling and Limited Waivers, July 17, 2008 ("AT&T Petition"), at 4. Among other things, AT&T requests a waiver of the Commission's rules to enable it to offset foregone revenues (from reducing its intrastate terminating access charges) by increasing its subscriber line charge ("SLC") above the level permitted by the *CALLS Order*, and to increase the interstate originating switched access component of its Average Traffic Sensitive ("ATS") rate above the level permitted by the *CALLS Order* up to a level that would yield an ATS rate of no higher than \$0.0095. *Access Charge Reform*, Sixth Report and Order, 15 FCC Rcd 12962 (2000) ("*CALLS Order*"). The *CALLS Order* adopted an integrated interstate access reform and universal service proposal put forth by the members of the Coalition for Affordable Local and Long Distance Service. Interstate Access charges were reduced and subscriber line rates were increased and capped which brought lower rates for consumers. The \$0.0095 ATS rate corresponds with the rate permitted under the *CALLS Order* for low-density price cap carriers. Under the *CALLS Order*, an ATS rate of \$0.0055 applies to the Bell operating company local exchange carriers.

<sup>5</sup> / Rate Counsel incorporates herein by reference its comments submitted August 12, 2008, regarding the AT&T Petition in WC Docket No. 08-152 because Embarq's Petition suffers similar-procedural flaws as does AT&T's Petition.

rates.”<sup>6</sup> Embarq alleges that its Petition differs from that of AT&T, and states that “different carriers may need different regulatory relief to unify switched access rates successfully,”<sup>7</sup> yet Embarq also states that the Commission may agree that Embarq’s Petition “is also appropriate for other rural price cap carriers who find themselves similarly situated.”<sup>8</sup>

Embarq asserts that “[p]reserving access revenues is essential to ensure that Americans in all areas of the country, including those in rural areas, receive quality service.”<sup>9</sup> Embarq further asserts that it is a “predominately rural carrier, and it and the areas it serves suffer harm because of regulatory arbitrage of access charges.”<sup>10</sup> As set forth in its Petition, Embarq would seek state approval of its changes to intrastate access charges,<sup>11</sup> and Embarq would base unified switched access rates on calendar year 2007 total interstate and intrastate switched access revenues and minutes of use.<sup>12</sup>

Unlike AT&T’s Petition, the Embarq Petition does not seek to recover foregone switched access revenues from consumers through an increase in the subscriber line charge, an attribute which renders Embarq’s Petition slightly more palatable to consumers than AT&T’s Petition. However, similar to AT&T’s approach, Embarq seemingly seeks to be “made whole” as a result of the reform of intercarrier compensation, which means that the Embarq Petition is fundamentally flawed. Rate Counsel concurs with Sprint Nextel in its rejection of “the notion that any carrier or class of carrier is automatically entitled to a guaranteed revenue stream to

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<sup>6</sup> / Embarq Petition, at 2.

<sup>7</sup> / Embarq Petition, at 3.

<sup>8</sup> / Embarq Petition, at 4.

<sup>9</sup> / Embarq Petition, at 12.

<sup>10</sup> / Embarq Petition, at 18.

<sup>11</sup> / Embarq Petition, at 21-22.

<sup>12</sup> / Embarq Petition, at 22. In New Jersey, interstate and intrastate switched access rates, presently \$0.0072 and \$0.0250, respectively, would be unified at a rate of \$0.0148. *Id.*, at Exhibit C.

neutralize the impact of regulatory reforms.”<sup>13</sup> Furthermore, as Sprint Nextel aptly states, carriers provide many services (such as broadband, video, and voice over IP), over networks that carriers have built in part with universal service subsidies and access charges.<sup>14</sup> In any assessment of the need for an alternative recovery mechanism for revenues “foregone” as a result of intercarrier compensation reform, it is important, as Sprint Nextel states “to consider the overall corporate situation.”<sup>15</sup>

Furthermore, although Rate Counsel continues to support the establishment of a rational intercarrier compensation regime, including the payment of access charges by all carriers regardless of the underlying technology that they use,<sup>16</sup> Rate Counsel is not persuaded that Embarq’s Petition (or AT&T’s Petition) requires more urgent attention than other pressing regulatory matters, such as excessive intercarrier special access rates.<sup>17</sup>

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<sup>13</sup> / Re Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, IP-Enabled Services, WC Docket No. 04-36, Letter to Marlene H. Dortch, Secretary, Federal Communications Commission from Norina Moy, Director, Government Affairs, Sprint Nextel, August 7, 2008 (“Sprint Nextel Letter”), at 1.

<sup>14</sup> / Sprint Nextel Letter, at 2.

<sup>15</sup> / Sprint Nextel Letter, at 2.

<sup>16</sup> / See e.g., Rate Counsel’s comments in the IP-Enabled Services Proceeding; accord Rate Counsel comments in WC Docket No. 05-276, dated December 7, 2006 (stating, among other things, “When voice calls are handled over the ‘traditional’ interexchange carrier network or using IP technology, they should be assessed comparable access charges, consistent with the existing access charge framework, and, in the future, according to the unified intercarrier compensation regime presently under consideration by the FCC in Docket 01-92).

<sup>17</sup> / See Sprint Nextel Letter, at 3. In 2007, the FCC asked parties to refresh the record in the special access proceeding. Federal Communications Commission, Public Notice, “Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking,” WC Docket No. 05-25, RM-10593, FCC 07-123, released July 9, 2007 (“Public Notice”). See also WC Docket No. 05-35, initial and reply comments submitted by Rate Counsel on August 8, 2007 and August 15, 2007, submitted in response to the Commission’s notice, and Rate Counsel initial and reply comments, June 13, 2005 and July 29, 2005.

**A. The FCC should dismiss the Petition because the issue of access charges on VoIP is presently before the FCC for decision in IP-Enabled Services proceeding, WC Docket No. 04-36, the Petition is not complete as filed, and Embarq has failed to exhaust other administrative remedies**

Rate Counsel submits that the Petition should be dismissed on three grounds. First, the subject matter of the Petition is currently before the FCC in the IP-Enabled Services proceeding pending FCC's final action and therefore, the Petition is seeking duplicative relief. Rate Counsel continues to support the establishment of a rational intercarrier compensation regime, including the payment of access charges by all carriers regardless of the underlying technology that they use.<sup>18</sup>

Also, Embarq's Petition is incomplete as filed. The FCC has imposed complete when filed requirements when there is a short time to act.<sup>19</sup> Embarq simply fails to provide the data necessary to enable meaningful analysis of and comment on its Petition and as a result, the Petition is incomplete as filed, warranting dismissal. Finally, Rate Counsel submits that Embarq has neglected to exhaust its administrative remedies by seeking relief under Section 208. Embarq has failed to demonstrate that the Section 208 complaint process is an inadequate remedy for the harms regarding the payment of access charges on VoIP traffic and improper arbitrage which underlie its request for a declaratory ruling in this matter.<sup>20</sup> In view of the foregoing, the FCC should exercise its discretion and dismiss the Petition.

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<sup>18</sup> / See, Rate Counsel's comments in the IP-Enabled Services Proceeding; accord Rate Counsel comments in WC Docket No. 05-276, dated December 7, 2006 (stating, among other things, "When voice calls are handled over the 'traditional' interexchange carrier network or using IP technology, they should be assessed comparable access charges, consistent with the existing access charge framework, and, in the future, according to the unified intercarrier compensation regime presently under consideration by the FCC in Docket 01-92).

<sup>19</sup> / See *Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, DA 01-734 (CCB re. Mar. 23, 2001); see *SWBT/Oklahoma Order*, 16 FCC Rcd at 6247, para. 21.

<sup>20</sup> / Petition, at 15-18 (discussing access charge arbitrage).

**B. If the Petition is not dismissed, the Commission should require Embarq to supplement the Petition with additional data and support, and the Commission should proceed by notice of proposed rulemaking and consider such Petition as part of such rulemaking.**

Embarq's Petition is an improper modification to the *CALLS Order*, and would modify the existing interstate access charge plan, the plan submitted nine years ago by the Coalition for Affordable Local and Long Distance Services ("CALLS"),<sup>21</sup> and yet through its Petition, Embarq seeks to abridge the notice and comment period for such proposed modifications. The original CALLS proposal, which was presented as a "comprehensive solution to the membership's access charges," was subject to a notice of proposed rulemaking, with an original 44-day initial comment period and a 21-day reply comment period,<sup>22</sup> and the subsequently modified CALLS proposal was subject to 22-day initial comment period and then 14-day reply comment period.<sup>23</sup> The scope of the changes requested should be noticed by publication in the *Federal Register*, so that all interested parties are afforded the opportunity to comment.

If changes to the rules adopted in the CALLS Order are to be considered, the FCC should proceed by issuance of a notice of proposed rulemaking so that full public participation is possible. Such changes should not be done absent rulemaking

### **III. CONCLUSION**

Rate Counsel recommends that the Commission dismiss Embarq's Petition. In the alternative, if the FCC is considering making modifications to the *CALLS Order*, such changes

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<sup>21</sup> / *Access Charge Reform*, Sixth Report and Order, 15 FCC Rcd 12962 (2000) ("CALLS Order").

<sup>22</sup> / *In the Matter of Access Charge Reform*, CC Docket No. 96-262, *Notice of Proposed Rulemaking*, rel. September 15, 1999. 14 FCC Rcd 16872.



<sup>23</sup> / "Coalition for Affordable Local and Long Distance Services (CALLS) Modified Proposal, CC Docket No. 96-262, CC Docket No. 94-1, CC Docket No. 99-249, CC Docket No. 96-45," DA 00-533, March 8, 2000.

should be undertaken by issuance of a further notice of proposed rulemaking with proper notice to the public, with directions to Embarq to supplement its Petition, and consideration of such supplemented Petition as part of the rulemaking.

Respectfully submitted,

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